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9 Attorneys for BRIAN WAYNE WENDT

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 vs.

16 JONATHAN JOSEPH NELSON, et al.,

17 Defendants.

**Case No. CR-17-00533-EMC**

**BRIAN WENDT'S SUPPLEMENTAL  
OPPOSITION TO GOVERNMENT  
MOTION FOR LEAVE TO FILE FOR  
RECONSIDERATION OF  
JANUARY 13, 2021 DISCOVERY  
ORDERS [DOC 1448] AND  
PROPOSED MOTION FOR PARTIAL  
RECONSIDERATION [DOC 1449]**

**Date: March 24, 2021**

**Time: 9:00AM**

**Dept: The Honorable Edward M. Chen  
District Judge**

22 The Government has moved to reconsider two case management orders issued on  
23 January 13, 2021 complaining that the Court failed to consider Rule 16 and the Jencks  
24 Act before ruling. (Docket 1448). Based on this both surprising and unsubstantiated  
25 complaint, the Government secured from the Court an opportunity to supplement its  
26 highly redacted motion (Docket 1449) so that the defense could have a reasonable  
27 opportunity to respond. Unfortunately, and consistent with its approach to discovery  
28

**BRIAN WENDT'S SUPPLEMENTAL OPPOSITION TO GOVERNMENT MOTION FOR LEAVE TO FILE FOR  
RECONSIDERATION OF JANUARY 13, 2021 DISCOVERY ORDERS [DOC 1448] AND PROPOSED MOTION FOR  
PARTIAL RECONSIDERATION [DOC 1449]**

1 issues throughout this case, the Government has not only failed to provide a remotely  
 2 colorable basis for moving to reconsider its January 13, 2021, orders but has also failed to  
 3 respect the letter and spirit of the Court's February 24, 2021, order which the Court  
 4 issued to provide the Government the opportunity to permit the defense to have sufficient  
 5 information to respond to the Motion to Reconsider. The Government's approach here,  
 6 embodied in the Government's 3 page March 3, 2021, letter to defense counsel amounts  
 7 to strategic gesture, and not to a substantive response to the Court's directive, or the  
 8 stated defense arguments and concerns—particularly those of counsel for Brian Wendt.  
 9 The Government has failed to comply with the purpose and intent of disclosure orders  
 10 dating back to June of 2019. The latest failure clearly does little to address and help  
 11 remedy the substantial limitations imposed by the pandemic on the defense work during  
 12 the home stretch before trial.

13 For these reasons, Brian Wendt submits that this Court should affirm its necessary  
 14 and well-considered case management orders that were issued, as this Court knows,  
 15 based upon a fully developed record. Mr. Wendt submits that this Court's existing  
 16 January 13, 2021, case management orders are necessary to allow his counsel to conduct  
 17 necessary litigation and investigation before the October trial date and that, absent these  
 18 orders, he will face the choice between going to trial unprepared to address the  
 19 centerpieces of the Government's list of witnesses or moving for a continuance of the  
 20 trial date despite the fact that he will have been in custody for more than four years  
 21 should the trial commence in October.

22 **I. On January 13, 2021, this Court Issued Two Case Management Orders**  
 23 **Necessary to Allow the Defense to Prepare for Trial Before October 2021.**

24 On January 13, 2021, this Court issued two case management orders to address the  
 25 limitations imposed by the pandemic on defense functions in the few months remaining  
 26 before the October trial date.<sup>1</sup> More specifically, this Court ordered the Government to  
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28 <sup>1</sup>On January 13, 2021, according to the Minutes, the Court "addressed the Government's appeal of Judge Beeler's

1 produce witness statements six months before trial and to immediately produce AEO  
 2 materials which had been improperly withheld by the Government despite numerous  
 3 direct orders first issued in June 2019 and reaffirmed repeatedly since that date. The  
 4 Court heard extensive argument of these issues – which had been fully briefed – and  
 5 ruled, in no uncertain terms, that these orders were necessary to move this case toward an  
 6 October trial date given the unprecedented challenges to the Sixth Amendment function  
 7 during the pandemic:

8 [W]e're confronted with pandemic situations and extraordinary  
 9 situations where you can't just go by the ordinary rule about, well, we  
 10 can disclose six weeks before, eight weeks before and that's plenty of  
 11 time to do your investigation; both given the complexity of this case, as  
 12 well as the potential unknown[s] out there about what can be done, how  
 13 quickly it can be done, at what point we can resume – can the parties  
 14 resume the normal processing of investigation and preparation for trial.  
 And yet we have to make a decision whether we're going to try to hold  
 this trial date.

15 So these present extraordinary circumstances which underscores this  
 16 Court's inherent power in the *W.R. Grace* case to order early discovery.  
 17 And early discovery in an unusual circumstance that – for which there  
 was no precedent, whether it's *Cerna* or any of those other cases.<sup>2</sup>

## 18     II.    The Government Clearly Failed to Provide Any Basis to for Leave to Move to Reconsider.

20 After the January 13, 2021, hearing, the Government moved for reconsideration of  
 21 these necessary orders. (Docket 1448 and 1449). The Government so moved on the  
 22 extremely thin and easily refutable notion that the Court failed to consider both Rule 16

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 24 discovery order...." [Doc 1419, at page 4.] The January 13 Order had required continuing disclosure of 'witness  
 25 safety' material designated as AEO. Also, the Court affirmed the Beeler Order "only with respect to the three  
 26 defendants currently scheduled to be tried in Group 1." (Doc 1419, at page 4.) The Court set forth further  
 requirements, including that the Government should provide the defense with information about "...the number of  
 Jencks witnesses whose statements are being withheld and the number of pages of Jencks materials so that  
 27 defendants will have some notion of their scope." (Doc 1419, at page 4.)

28 <sup>2</sup> Transcript of proceedings of January 13, 2021, at RT 116:7-21.

1 and the Jencks Act before issuing its Orders.<sup>3</sup>

2 This notion as well as what arguments the Government mustered collide with the  
 3 actual record in this case, and with the stated bases for the Court's Order. This Court did  
 4 not negligently overlook the Jencks Act and Rule 16 in issuing these orders. In fact, the  
 5 transcript of the January 13, 2021 hearing includes numerous references by Government  
 6 counsel to the Jencks Act and to Rule 16 across many pages of argument regarding these  
 7 orders.

8

9       **III. The Government Squandered the Opportunity to Provide the Accused**  
**with Sufficient Information to Litigate the Motion to Reconsider.**

10

11       On February 24, 2021, the Court heard argument regarding the Government's  
 12 Motion for Leave. Without responding to questions about the level of the Government's  
 13 compliance with Judge Beeler's rulings beginning in 2019 for rolling productions of  
 14 AEO materials (RT 14-15), the Government explained to the Court that it was seeking  
 15 reconsideration of the January 13 Order as it applied to 172 pages of materials that had  
 16 been submitted to the Court (RT 16), supplemented by information contained in one  
 17 individual's phone (RT 16-17).<sup>4</sup> The Government's argument was that it was seeking to  
 18 have the Court exempt from six months prior to the trial disclosure those materials  
 19 specifically identified in Exhibits 8-12 of the *ex parte* submission to the Court (a  
 20 combination of Agent reports and actual Jencks Act statements). (RT 19.) For these  
 21 materials specifically identified, the Government was proposing a production three  
 22 months before trial. (RT 19.)

23       Counsel for Jon Nelson responded that in order to be able to address the question

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25       <sup>3</sup>The Government filed its motion for leave to file a motion for reconsideration (Doc 1448), together with the actual  
 26 motion (Doc 1449), which was opposed by the Group 1 defendants in a filing on February 5, 2021 (Doc 1474). This  
 was the frame for the arguments made on February 24, 2021.

27       <sup>4</sup>This Court should establish whether or not there have been intentional violations by the Government of the AEO  
 28 case management orders. The record suggests that the Government has withheld reports that existed in 2019 and  
 should have been disclosed. This Court should voir dire the Government and what has been withheld and why.

1 of whether the defense should respond to the Government's motion for leave, it would be  
 2 useful for the defense to at least have some notion of what type of information was  
 3 involved in the 170-plus pages so that the defense could assess a substantive response.

4 During the hearing, the Wendt defense noted its concern that the proposal made by  
 5 Mr. Novak on behalf of Jon Nelson, might be viewed as confusing, in view of existing  
 6 orders that had been put in place by Judge Beeler and that were supposed to have been  
 7 complied with on a rolling basis. As counsel for the Wendt defense pointed out: "And we  
 8 are now back to discussing, sort of parsing out alternative mechanisms for the  
 9 government to comply with some aspect of Judge Beeler's orders. It just doesn't make  
 10 sense. We're not moving this case forward in that respect." (RT 34:15-18.)<sup>5</sup>

11 Notwithstanding Mr. Wendt's objections to the motion, the Court carved out  
 12 "middle ground" by offering the Government the opportunity disclose limited useful  
 13 information "in the vein of a privilege log" (Docket 1513, Minute Order) to allow the  
 14 defense to evaluate the merits of the reconsideration motion based on some understanding  
 15 of the reports and materials withheld.<sup>6</sup>

16 Unfortunately, the Government squandered the opportunity extended by the Court.  
 17 Rather than providing the defense with information that would allow the defense to  
 18 oppose the Government's motion in a meaningful way, the Government provided a letter  
 19 on March 3, 2021, attached hereto as Exhibit 1, that conveys virtually no useful  
 20 information at all consuming, in the process, another month of valuable and limited time  
 21 as we slouch toward the October trial date. The Government's March 3, 2021 letter  
 22 provides generalities at best, and in certain instances, simply a listing of the particular

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 25 <sup>5</sup> The Wendt defense also indicated that it was not joining in Mr. Novak's proposal "about some sort of alternative.  
 Our position is the Court has decided this already on multiple occasions." (RT 34:20-22.)

26  
 27 <sup>6</sup> The Court described the information to be provided as "a privilege log-type description," (RT of February 24, 2021  
 hearing at 36:21-22) and discussed the nature of proffer at pages 36-38 of that transcript. The Court directed, for  
 example, that the acts being discussed in the reports be "generically described" without revealing witness identities  
 (RT at 37:3) The Court also directed that "it may not describe the exact act but something that happened as part of  
 their relationship with the enterprise, or whatever, versus something more specific." RT at 38:14-16.

1 counts that the witness will “provide testimony” about. Providing the defense in a  
 2 racketeering conspiracy case “notice” that a witness will provide testimony relating to the  
 3 racketeering conspiracy – particularly one that covers multiple acts over a number of  
 4 years and jurisdictions – clearly fails to provide the level of specificity contemplated by  
 5 the Court and does not allow for a meaningful response by the accused. The  
 6 Government’s letter simply does not square with the representations made by the  
 7 Government to the Court on February 24, 2021, that the letter would sufficiently inform  
 8 defense counsel of the nature of information pertinent to five witnesses.

9 Given the total lack of a basis for leave to reconsider compounded by the failure to  
 10 comply with this Court’s specific order to provide the defense with sufficient information  
 11 to engage the merits, this Court should not reward the Government’s stonewalling and  
 12 should not waste another day of the limited days remaining before trial.

13 **IV. The Government Has Consistently Violated this Court’s AEO Discovery**  
 14 **Orders.**

15 Regrettably, the need for firm case management of this set of discovery issues  
 16 cannot be summarized in a nutshell. This is because one of the issues before the Court,  
 17 AEO disclosures, has been litigated numerous times since Judge Beeler first issued her  
 18 clear and unequivocal order requiring disclosure of law enforcement reports on a rolling  
 19 basis. (Docket 703).

20 Beginning in June 2019, this Court issued a series of Orders regarding AEO  
 21 discovery of law enforcement reports. The Court did so, invoking its case management  
 22 authority, based on a pattern of delay by the Government with respect to discovery, death  
 23 penalty notice, and disclosures (some of which alerted the defense to conflict issues  
 24 which have required significant delays and complications in the defense). The Court, first  
 25 through the Magistrate Court and subsequently through the District Court, issued clear  
 26 and specific Orders intended to allow the defense to operate on a reasonably level playing  
 27 field and understand the parameters of the Government’s case. Though no one knew what  
 28

1 was to come in 2020, the Court took these measures before the pandemic froze  
 2 investigation in the field.

3 The Government has consistently stonewalled these Orders. First, the Government  
 4 claimed that these Orders merely required a little less redaction. That was litigated and  
 5 rejected. Then the Government claimed that the Court had not ordered rolling production.  
 6 That was litigated and rejected (though the Government made this argument again twice  
 7 during recent hearings in the District Court). After failing to make any rolling  
 8 productions, in October 2019, the Government requested specific exclusions and the  
 9 Court granted a set of limited, specific, and minimal exclusions from the productions.

10 Many months later, in late May 2020, the Government let slip during a hearing  
 11 that it had AEO materials which it had not produced in 2019 despite this Court's  
 12 Orders. The Government did not explain the reasoning for withholding these documents  
 13 except to repeat its incorrect and twice-litigated-and-rejected view that the Court had not  
 14 ordered rolling productions. When Mr. Wendt objected to this violation of the Orders, the  
 15 Government asked for an opportunity to brief these issues and, again, the Court heard and  
 16 rejected the Government's arguments in September 2020.

17 This scenario occurred again on January 13, 2021 and, again, the Court ordered  
 18 the Government to comply with the June 2019 Order.

19

20       **V. THE GOVERNMENT HAS OVERSTATED THE REACH OF THE**  
**JENCKS ACT WHICH, IN ANY CASE, IS SUBORDINATE TO**  
**CASE MANAGEMENT PREROGATIVES UNDER W.R. GRACE**  
**GIVEN THE EXTRAORDINARY CIRCUMSTANCES OF THE**  
**PANDEMIC.**

21 The Government's argument to this Court on February 24, 2021, clearly  
 22 overstated the reach of the Jencks Act. The Government attempted to characterize agent  
 23 reports of witness interviews as the "Jencks statements of authoring agents...." (RT 19:5-  
 24 7.) That argument was not correct. The Jencks Act encompasses witness statements and  
 25 does not encompass narrative reports and memoranda from law enforcement officers. As  
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1 demonstrated by the U.S. Supreme Court's ruling in *Campbell v. United States*, 365 U.S.  
 2 85 (1961), in a case in which the Government contended that an FBI Agent's interview  
 3 report of a witness was not a Jencks Act statement under the circumstances of that case,  
 4 the United States Supreme Court chided both the Government, and a District Judge, for a  
 5 failure of inquiry into the nature and content of an interview report, which the  
 6 Government chose in that case to not characterize as a 'statement.' "We conclude that  
 7 because these errors in the conduct of the inquiry, petitioners are entitled to a  
 8 redetermination of their motion for the production of Staula's pretrial statements..." *Id.* at  
 9 99-100.<sup>7</sup>

10 The record of the status conference and hearing of February 24, 2021, does not  
 11 indicate, or even suggest, that the Court conducted an independent review such as to be  
 12 able to assess the extent to which the Government was accurate in stating that it would  
 13 have the right to withhold disclosure of the vast majority of the 172-plus pages of  
 14 material discussed during the hearing on the basis that the bulk of that material was truly  
 15 Jencks Act covered. Nor did the Court indicate, in response to the Government's  
 16 assertions that the Government had concluded that there was no *Brady* material  
 17 intertwined, that the Government had accurately determined that it was not withholding  
 18 any non-Jencks *Brady* material. This type of material, as Judge Alsup concluded, is  
 19 material "that district courts have the authority, upon a proper record, to exercise their  
 20 discretion to require...be disclosed prior to the commencement of trial." *U.S. v. Cerna*,  
 21 633 F.Supp.2d 1053, 1057-58 (N.D.Cal, 2009), *relying in part on United States v. W.R.*  
 22 *Grace*, 526 F.3d 499, 513 (9th Cir., 2008).

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25 <sup>7</sup> It should be noted, moreover, that the Jencks-as-to-agents argument is totally inconsistent with the Government's  
 26 stated purpose for the appeal: to protect civilian witness identities. Asserting that law enforcement witness  
 27 statements are Jencks should not be disclosed is, at best, a tactic to protect information obtained from civilian  
 witnesses but not recorded as verbatim or substantially verbatim. Again, what is at stake here is information, not  
 witness statements, which the Government possesses and can use to investigate and shape its case but which the  
 defense cannot.

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**V. THE GOVERNMENT ERRONEOUSLY MAKES REFERENCE TO THE RULE OF U.S. v. FORT et al., WHICH, IN ANY CASE, IS SUBORDINATE TO CASE MANAGEMENT PREROGATIVES UNDER W.R. GRACE.**

The question of exactly how much of the information cabined by the Government and presented to the Court *in camera* and *ex parte* is actually sought to be protected under an exercise of discretion within the meaning of F.R.C.P. 16(d) remains a mystery to the defense.

Presumably, on February 24, 2021, the Court had in mind a procedure that would be useful in permitting the defense access to information that would allow defense preparation for the Group 1 trial to proceed while avoiding presenting danger to the safety of five specific witnesses. The March 3, 2021 letter is insufficient. It does not respond to the Court’s suggestions of content or to defense counsels’ suggestions (made on February 24, 2021) of what might avoid having the Court fully consider the merits of the Government’s proposed motion for reconsideration. As the Court made clear in its Discovery Order of January 13, 2021, the discovery-related management of this case has to be viewed in context given the circumstances under which the defense is attempting to prepare itself for trial in the midst of a worldwide pandemic and in the middle of attempts throughout California and other states to abate what has been a more than yearlong nationwide disaster. In that context, citing rulings like *U.S. v. Fort*, 472 F.3d 1106 (9th Cir., 2006), has limited utility. The reality in this case is that much of what the Government seeks to shield here does not fall under the *Fort* rule in that few investigative reports at issue in this particular case were created prior to the involvement of a Federal prosecutor’s involvement and prior to a Federal investigation. *Id.*, at 1110-11.

## CONCLUSION

This Court entered a Discovery Order in this case designed to facilitate preparation for a trial that would be conducted under extraordinary circumstances (both the

1 preparation and likely the trial as well). The Government's attempt to thread the needle  
2 through the production of a barely informative three-page letter should be considered  
3 insufficient to foreclose implementation of the Court's February 13, 2021 Discovery  
4 Order as it was entered, or Judge Beeler's preexisting orders concerning rolling AEO  
5 discovery.

6

7 Dated: March 17, 2021

Respectfully Submitted,

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JOHN T. PHILIPSBORN  
MARTIN ANTONIO SABELLI

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10

*/s/ John T. Philipsborn*

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JOHN T. PHILIPSBORN

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Attorneys for Brian Wayne Wendt

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14

*/s/ Martín A. Sabelli*

MARTIN ANTONIO SABELLI

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## **PROOF OF SERVICE**

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is Suite 350, 507 Polk Street, San Francisco, California 94102.

On March 17th, 2021, I served the within document entitled:

**WENDT DEFENSE SUPPLEMENT TO OPPOSITION [DOC 1447] TO  
MOTION FOR LEAVE TO FILE FOR RECONSIDERATION OF  
JANUARY 13, 2021 DISCOVERY ORDER [DOC 1448] AND PROPOSED  
MOTION FOR PARTIAL RECONSIDERATION [DOC 1449]**

- By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;
  - By electronically transmitting a true copy thereof through the Court's ECF system;
  - By having a messenger personally deliver a true copy thereof to the person and/or office of the person at the address set forth below.

AUSA Kevin Barry  
AUSA Ajay Krishnamurthy  
AUSA Lina Peng

All defense counsel through ECF

Executed this 17<sup>th</sup> day of March, 2021, at San Francisco, California.

Signed: /s/ Melissa Stern  
Melissa Stern

**BRIAN WENDT'S SUPPLEMENTAL OPPOSITION TO GOVERNMENT MOTION FOR LEAVE TO FILE FOR RECONSIDERATION OF JANUARY 13, 2021 DISCOVERY ORDERS [DOC 1448] AND PROPOSED MOTION FOR PARTIAL RECONSIDERATION [DOC 1449]**